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UNITED STATES OF AMERICA

UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,

Plaintiff,

v.

GARY ROGERS,

Defendant.

No. ED CV 14-2292-VAP  
(No. ED CR 12-57-VAP)

GOVERNMENT'S OPPOSITION TO  
DEFENDANT'S MOTION FOR RELIEF  
PURSUANT TO 28 U.S.C. § 2255;  
EXHIBITS

Plaintiff United States of America, by and through its counsel  
of record, the United States Attorney for the Central District of  
California and Assistant United States Attorney AMI SHETH, hereby  
files its opposition to defendant's motion for relief pursuant to 28  
U.S.C. § 2255.

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1 The government's opposition is based upon the attached  
2 memorandum of points and authorities, the attached exhibits, the  
3 files and records in this case, and such further evidence and  
4 argument as the Court may permit.

5 Dated: December 3, 2014

Respectfully submitted,

6 STEPHANIE YONEKURA  
Acting United States Attorney

7  
8 ROBERT E. DUGDALE  
Assistant United States Attorney  
Chief, Criminal Division

9  
10 /s/  
\_\_\_\_\_  
11 AMI SHETH  
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12 Attorneys for Plaintiff  
13 UNITED STATES OF AMERICA  
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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 On November 6, 2014, defendant Gary Rogers ("defendant" or "G.  
4 Rogers") filed a motion for relief from his sentence pursuant to 28  
5 U.S.C. § 2255.<sup>1</sup> CR 467, Defendant's Motion for Relief Pursuant to 28  
6 U.S.C. § 2255 ("Defendant's 2255 Motion). In his motion, defendant  
7 raises the following three grounds for relief: (1) his attorney  
8 failed to present evidence of defendant's mental disabilities to the  
9 Court at sentencing; (2) defendant had no access to a law library  
10 prior to signing his plea agreement; and (3) defendant's attorney  
11 told defendant that he would not be held accountable for the actions  
12 of other co-defendants and that he would not get a sentence of 204  
13 months' imprisonment. As described below, defendant's arguments lack  
14 merit and this § 2255 motion should accordingly be denied.

15 **II. STATEMENT OF FACTS**

16 **A. Offense Conduct**

17 Beginning in approximately January 2011, the Inland Child  
18 Exploitation/Prostitution Task Force began investigating a group of  
19 individuals for the sex trafficking of minors. Investigators  
20 identified Rolling 60s Crips gang members and female associates who  
21 recruited and employed minors for the purpose of child prostitution  
22 and benefitted financially from the prostitution proceeds from  
23 approximately January through August 2011. CR 363, Presentence

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24 <sup>1</sup> Pursuant to the Court's Order Requiring Return to Defendant's  
25 § 2255 Motion, the Respondent is to serve a copy of the Return upon  
26 the Petitioner prior to the filing of this Opposition. The  
27 government will ensure that a service copy is mailed to the  
28 Petitioner at his current Bureau of Prisons designation tomorrow,  
December 4, 2014, and will thereafter file proof of such service.  
The government apologizes for the delay in sending the service copy  
to the Petitioner.

1 Report ("PSR") ¶ 17. Specifically, investigators identified four  
2 male pimps (Paul Bell, Samuel Rogers ("S. Rogers"), Gary Rogers, and  
3 Christopher Weldon) and three female associates (Javiya Brooks,  
4 Kimberly Alberti, and Kristy Harrell) who recruited and employed  
5 minors for the purpose of prostitution, and one female associate that  
6 helped manage the prostitution proceeds for one of the pimps (Su  
7 Yan). Id., ¶¶ 18-20. The female associate for a pimp was often  
8 called his "bottom" or "bottom bitch," meaning that pimp's most  
9 trusted prostitute who helped recruit and manage the pimp's other  
10 prostitutes. In this case, Brooks' was Bell's bottom, Alberti was S.  
11 Rogers' bottom, and Harrell was G. Rogers' bottom. Id., ¶ 19.

12 Investigators also identified at least seven victims in this  
13 case, referred to as Victim 1 - Victim 7. Id., ¶ 21. All of the  
14 victims except Victim 6 were under 18 when the conduct occurred. Id.  
15 Victim 6 was an adult when the alleged crimes occurred but was used  
16 as a prostitute through force, threats of force, fraud, and coercion.  
17 Id.

18 Defendant Gary Rogers worked closely with Harrell as his bottom,  
19 and also with co-defendants Bell and S. Rogers. While they had their  
20 own prostitutes who provided them with prostitution proceeds, the  
21 pimps often discussed recruiting or 'trading' females. Id., ¶ 18.  
22 Or, when one or more of them was in custody, they managed the  
23 prostitutes for the other suspects. Id.

24 G. Rogers, Bell, and S. Rogers often discussed recruiting and  
25 managing their prostitutes together. Jails calls between G. Rogers,  
26 Bell, S. Rogers, and other co-defendants in March and April of 2011,  
27 demonstrate how the G. Rogers worked with his co-conspirator pimps to  
28 further their sex trafficking enterprise and to make money for the

1 purpose of bailing himself and S. Rogers out of jail. CR 412,  
2 Exhibit B to Government's Sentencing Reply, Description of Selected  
3 Jail Calls on March 24, 28-30, 2011, and April 8, 10-12, 2011. For  
4 example, during an April 11, 2011, jail call, co-defendants G.  
5 Rogers, Bell, and S. Rogers all discuss the prostitution business.  
6 CR 412, Exhibit C to Government's Sentencing Reply, Transcript for  
7 April 11, 2011, Jail Call. During the call, G. Rogers states that  
8 "Shelly trying to work to get you out too," referring to a female  
9 Bell identifies as 15 years old who is working as a prostitute to  
10 earn enough money to bail S. Rogers out of jail. Id., p. 4122.  
11 Later in the call, both Bell and G. Rogers ask each other why the  
12 other one "ain't selling your bitch," questioning why each other's  
13 prostitutes are not working. Id., p. 4123. Bell later tells G.  
14 Rogers to "bring the bitch to another blade. Sit the bitch down out  
15 there," instructing G. Rogers to make his prostitutes work. Id., p.  
16 4124. Later in the phone call, G. Rogers states that "Shelly want to  
17 get down too. Man, I don't care how old she is, she can get down out  
18 there and then send the money," again talking about causing a 15-year  
19 old female to work as a prostitute. Id., p. 4140.

20 In addition to, and as a part of, defendant's participation in  
21 the sex trafficking conspiracy, defendant G. Rogers used his  
22 "bottom," co-defendant Harrell as a prostitute and directed her to  
23 supervise Victim 6 as a prostitute. CR 363, PSR ¶¶ 18, 19, 23, 24.  
24 Specifically, in February and March, 2011, Alberti befriended V6  
25 (then 19) on Facebook and started recruiting her to work as a  
26 prostitute. Id., ¶ 24. On or about March 6, 2011, G. Rogers, along  
27 with co-defendants S. Rogers and Alberti, drove to Victim 6's home  
28 and picked her up. Id., ¶¶ 24, 28. The defendants brought Victim 6

1 back to a hotel in the Compton area. Id. Both G. Rogers and S.  
2 Rogers engaged in sexual conduct with Victim 6. Id.

3 G. Rogers persuaded Victim 6 to work for him as a prostitute.  
4 Id. He directed Victim 6 and co-defendant Harrell to go out on the  
5 street to look for dates for prostitution and instructed Harrell to  
6 teach Victim 6 what to do to get dates, how much to charge dates for  
7 prostitution, and other rules Victim 6 had to follow. Id. G. Rogers  
8 later physically abused Victim 6 for not making money for him from  
9 prostitution, and for not following his rules. Id. G. Rogers also  
10 directed Harrell to hit Victim 6, which she did. Id. Furthermore,  
11 the investigation uncovered evidence that Victim 6 had the mental  
12 capacity of a young child. Specifically, Victim 6's grandmother  
13 described Victim 6 as having the mental capacity of a 12-year-old,  
14 and a law enforcement officer described Victim 6 as "child-like."  
15 Id., p. 9, fn. 2.

16 **B. The Charges and Defendant's Guilty Plea**

17 On August 1, 2012, a federal grand jury returned an eighteen-  
18 count indictment against eight defendants, including G. Rogers,  
19 charging them with various crimes related to sex trafficking of both  
20 minors and using force, fraud, and coercion. CR 1, Indictment. G.  
21 Rogers was later charged in a first superseding indictment in which  
22 he faced two counts: one count of conspiracy to engage in sex  
23 trafficking in violation of 18 U.S.C. § 1594(c), and one count of sex  
24 trafficking by force, fraud, or coercion in violation of 18 U.S.C.  
25 § 1591(a)(1), (b)(1). CR 234, First Superseding Indictment.

26 On November 4, 2013, counsel for defendant G. Rogers filed a  
27 request for a pre-plea report where defense counsel explained that  
28 the parties were "in the process of negotiating a plea agreement,"



1 and that the pre-plea report would allow the defendant "to be fully  
2 informed of the consequences of any potential plea." CR 227, Ex  
3 Parte Application for Pre-Plea Report. The pre-plea report was  
4 disclosed on November 19, 2013, and concluded that defendant would  
5 like have a criminal history category of V<sup>2</sup>, and that he would not  
6 likely be deemed a career offender within the meaning of the  
7 sentencing guidelines. CR 232, Pre-Plea Report as to G. Rogers.

8 On December 4, 2013, defendant pleaded guilty to conspiracy to  
9 commit sex trafficking in violation of 18 U.S.C. § 1594(c). CR 248,  
10 Plea Agreement; CR 339, Change of Plea; CR 363, PSR ¶¶ 1-3.  
11 Defendant entered his guilty plea pursuant to a written plea  
12 agreement with the government. Id.

13 In the written plea agreement, defendant agreed to plead guilty  
14 to count one of the superseding indictment (conspiracy to commit sex  
15 trafficking in violation of 18 U.S.C. § 1594(c)) in exchange for,  
16 among other things, the government's promise to dismiss the remaining  
17 count in the superseding indictment (for a violation of 18 U.S.C.  
18 § 1591(a)(1), (b)(1)), which would have carried a mandatory minimum  
19 sentence of 15 years' imprisonment). CR 248, Plea Agreement ¶ 3.  
20 The parties also agreed to a factual basis, a base offense level of  
21 34, a three-level reduction for acceptance of responsibility, and  
22 sentencing recommendations of no less than 120 months' imprisonment  
23 (for defendant) and no more than 210 months' imprisonment (for the  
24 government) - the latter of which is six months more than defendant's  
25

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26 <sup>2</sup> Pursuant to the subsequent PSR, the USPO correctly excluded  
27 three points for defendant's state conviction related to the offenses  
28 charged in the federal indictment, and therefore, defendant's  
criminal history category was determined to be IV, rather than V. CR  
363, PSR ¶¶ 53-66.

1 eventual sentence. Id., ¶¶ 11, 13, 3(d), 2(e), and 2(h). Defendant  
2 also agreed that he understood that:

3 defendant cannot have any expectation of receiving a  
4 sentencing within the calculated Sentencing Guidelines  
5 range, and that after considering the Sentencing Guidelines  
6 and the other § 3553(a) factors, the Court will be free to  
exercise its discretion to impose any sentence it finds  
appropriate up to the maximum set by statute for the crime  
of conviction.

7 Id., ¶ 12. The plea agreement also explicitly provided that the  
8 statutory maximum sentence for defendant's conviction is life  
9 imprisonment. Id., ¶ 5.

10 Defendant waived his right to appeal his conviction, id., ¶ 17,  
11 and, as provided as follows, specifically agreed to conditionally  
12 waive his right to appeal his sentence up to 240 months'  
13 imprisonment:

14 Defendant agrees that, provided the Court imposes a total  
15 term of imprisonment . . . of no more than 240 months,  
16 defendant gives up the right to appeal all of the  
17 following: (a) the procedures and calculations used to  
determine and impose any portion of the sentence; (b) the  
term of imprisonment imposed by the Court . . .

18 Id., ¶ 18.

19 The plea agreement also explicitly states that defendant remains  
20 bound to the plea agreement if the Court does not follow the parties'  
21 recommendations at sentence, and that no one could promise or  
22 guarantee what sentence defendant would receive:

23 Defendant understands that even if the Court ignores  
24 any sentencing recommendation, finds facts or reaches  
25 conclusions different from those agreed to, and/or imposes  
26 any sentence up to the maximum established by statute, the  
27 defendant cannot, for that reason, withdraw defendant's  
28 guilty plea, and defendant will remain bound to fulfill all  
defendant's obligations under this agreement. Defendant  
understands that no one -- not the prosecutor, defendant's  
attorney, or the Court -- can make a binding prediction or  
promise regarding the sentence defendant will receive,  
except that it will be within the statutory maximum.

1 Id., ¶ 26. Finally, directly above his signature, defendant  
2 declared:

3 I have read this agreement in its entirety. I have had  
4 enough time to review and consider this agreement, and I  
5 have carefully and thoroughly discussed every part of it  
6 with my attorney. I understand the terms of this  
7 agreement, and I voluntarily agree to its terms. I have  
8 discussed the evidence with my attorney, and my attorney  
9 has advised me of my rights, of possible pretrial motions  
10 that might be filed, of possible defenses that might be  
11 asserted either prior to or at trial, of the sentencing  
12 factors set forth in 18 U.S.C. § 3553(a), of relevant  
13 Sentencing Guideline provisions, and of the consequences of  
14 entering into this agreement. No promises, inducements, or  
15 representations of any kind have been made to me other than  
16 those contained in this agreement. No one has threatened  
17 or forced me in any way to enter into this agreement. I am  
18 satisfied with the representation of my attorney in this  
19 matter, and I am pleading guilty because I am guilty of the  
20 charges and wish to take advantage of the promises set  
21 forth in this agreement, and not for any other reason.

22 Id., p. 20.

23 At the change of plea, on December 4, 2013, the court questioned  
24 the defendant pursuant to Rule 11, and found that the plea was  
25 knowledgeable and voluntarily made. CR 339. Defendant affirmed that  
26 he understood that there would be a maximum penalty of life  
27 imprisonment, and that the Court had the discretion to sentence  
28 defendant within the maximum sentence. Defendant affirmed the  
contents of the factual basis after it was read to him. Defendant  
also affirmed that he understood that he was waiving, to a large  
extent, his right to appeal his conviction and sentence. He also  
affirmed that his plea was voluntary and that no one had threatened  
him into pleading guilty. The Court found, after observing his  
manner, demeanor and attitude, that defendant entered his guilty plea  
freely, knowingly, and voluntarily, and that there was a sufficient

1 factual basis to support his plea of guilty to count one of the first  
2 superseding indictment.

3 **C. Sentencing**

4 The PSR calculated a total offense level of 33 (after a three-  
5 level reduction for acceptance of responsibility) and a criminal  
6 history category of IV based on (1) a conviction for Carjacking (with  
7 at least six probation revocations and violations) in 2006, (2) a  
8 conviction for possession of a stolen vehicle and driving with a  
9 suspended license in 2010, and (3) for being on probation in both of  
10 the aforementioned cases while committing the instance offenses. CR  
11 363, PSR ¶¶ 36-47, 53-66. The PSR calculated the Guidelines range as  
12 188 to 235 months' imprisonment. PSR, ¶ 114. The United States  
13 Probation Officer ("USPO") recommended a prison term of 219 months,  
14 or 18 years and 3 months, based on a high-end recommendation of 235  
15 months, reduced by 16 months to account for defendant's state  
16 sentence for his conviction for Pay for Prostitution related to his  
17 offense conduct in this case regarding Victim 6. CR 362, USPO's  
18 Recommendation. One of the bases for a high-end recommendation was  
19 defendant's use of force and the nature of his crime:

20 G. Rogers physically abused Victim 6, and directed Harrell  
21 to abuse Victim 6 as well. This use of force served to  
22 coerce Victim 6 into prostitution activities and presumably  
23 inspired fear of repercussions for leaving. The fact that  
24 physical violence and injury were involved in the offense  
is not captured by the guideline range, which would be the  
same if the offense involved merely fraud or deceit rather  
than physical force.

25 Id., p. 7. In mitigation, the USPO also discussed defendant's  
26 disadvantaged childhood, lack of support as a juvenile, and his  
27 mental health, but determined that the latter was not sufficient to  
28 warrant a departure pursuant to USSG § 5K2.13. Id., p. 7-8.

1 In its sentencing brief, the government concurred with the  
2 USPO's calculations but argued for an additional two-level increase  
3 to defendant's offense level for vulnerable victim, pursuant to  
4 United States Sentencing Guideline ("USSG") § 3A1.1(b)(1), as to  
5 Victim 6. CR 377, Government's Sentencing Position. Based on an  
6 offense level of 35, the government's calculated sentencing range was  
7 235 to 293 months' imprisonment. Id. Consistent with the plea  
8 agreement, the government then recommended 210 months' (or 17 years  
9 and six months) in custody. Id.

10 Defendant sought a sentence of 120 months, or 10 years  
11 imprisonment. CR 396, Defendant's Sentencing Position. While  
12 defense counsel concurred with the sentencing calculations in the  
13 PSR, he raised several factual objections to the PSR, and also argued  
14 that defendant, having only been in a conspiracy with Harrell, should  
15 not be held accountable for actions related to a conspiracy involving  
16 Bell and S. Rogers. Id., p. 2.

17 Furthermore, in support of a 10-year sentencing recommendation,  
18 among other arguments, defense counsel presented mitigating  
19 information about the defendant, including his mental health:

20 Mr. Rogers' depression that resulted from losing his  
21 daughter, was so severe that his mother brought him to a  
22 psychiatrist, who diagnosed Mr. Rogers as bipolar and  
23 schizophrenic. Mr. Rogers took various psychiatric  
24 medications for his conditions, and participated in  
counseling while incarcerated, but never on his own - and  
eventually resorted to self-medicating through the use of  
marijuana and alcohol.

25 Id., p. 5. Defense counsel argued that defendant's mental health  
26 problems had a significant impact on Mr. Rogers, and that the Court  
27 should consider this hardship in mitigation, as "Mr. Rogers'  
28 psychiatric condition essentially going untreated and unmedicated for

1 several years, it's pretty clear that this had a profound effect on  
2 Mr. Rogers' behavior in the instant offense - as it clearly affected  
3 his views regarding his own self worth and the worth of others."  
4 Id., p. 6. Defense counsel urged the Court to consider Mr. Rogers'  
5 mental health history using the § 3553(a) factors to "fashion an  
6 appropriate sentence." Id.

7 In its reply, the government set forth its basis for arguing  
8 that defendant G. Rogers was involved in a conspiracy with Bell and  
9 S. Rogers, as well as with Harrell, and argued that G. Rogers'  
10 conduct went beyond his actions with Victim 6, but also extended to  
11 his participation in recruiting and using other prostitutes, both  
12 minors and adults, for financial gain. CR 412, Government's  
13 Sentencing Reply p. 2-5.

14 On April 11, 2014, the Court, after having reviewed the PSR, the  
15 USPO's recommendation, and all of the parties' sentencing filings,  
16 determined the offense level to be 35, and with a criminal history  
17 category of IV, the sentencing range to be 235 to 293 months. The  
18 Court then sentenced defendant to 204 months of imprisonment, or 17  
19 years. CR 423, Sentencing; CR 424, Judgment and Commitment Order.

20 **D. Direct Appeal and Defendant's Inmate Housing**

21 Defendant did not file a direct appeal. On April 30, 2014, the  
22 Court filed notice of improper communication to the Court and ordered  
23 that the document be rejected and not filed. CR 432. On July 7,  
24 2014, the government filed a notice of lodging for documents sent to  
25 the government by defendant. CR 445. These documents included a  
26 handwritten letter from defendant to the prosecutor assigned to this  
27 matter and a type-written document in the form of a legal pleading,  
28 the caption for which is "NOTICE OF APPEAL." Id. Finally, on July

1 22, 2014, the Court filed a second notice of improper communication  
2 to the Court and ordered that the document be rejected and not filed.  
3 CR 462.

4 From approximately August 23, 2012, to December 31, 2013,  
5 defendant was housed at Central Detention Center ("CDC") in San  
6 Bernardino, California, a county facility that houses federal inmates  
7 pursuant to a contract with the Marshals. See Exhibit A, Defendant's  
8 Custody Report. After defendant's change of plea, on December 31,  
9 2013, defendant was moved to Metropolitan Detention Center-Los  
10 Angeles ("MDC-LA"). Id. Defendant was in MDC-LA from approximately  
11 December 31, 2013, to June 3, 2014. Id. While at MDC-LA, defendant  
12 had access to a law library. See Exhibit B, Excerpt from the MDC-LA  
13 Admission & Orientation Handbook, p. 15 ("The electronic law library  
14 is available in housing units and in the education department.").

15 **E. Defendant's § 2255 Motion**

16 On November 6, 2014, defendant filed his 2255 Motion. CR 467,  
17 Defendant's 2255 Motion. In the motion, defendant asserts the  
18 following grounds for relief: (1) defendant's counsel failed to  
19 present his mental history report and therefore it was not considered  
20 at sentencing; (2) defendant had no access to a law library until  
21 after he signed his plea agreement; and (3) defendant signed the plea  
22 agreement in reliance of defendant's counsel's statements that  
23 defendant would not be held accountable for the other defendants in  
24 the case and that defendant would not get 204 months' imprisonment  
25 for his crimes. Id., p. 6, 9, and 13.

26 **III. ARGUMENT**

27 Defendant's challenges to his conviction and sentence fail due  
28 to procedural default, as they were never raised before the district

1 court or court of appeals on direct review. Furthermore, defendant  
 2 also failed to establish sufficient grounds for relief under § 2255  
 3 based on the merits of his claims. Therefore, defendant's § 2255  
 4 motion should be denied in its entirety and the Court should decline  
 5 to issue a certificate of appealability.

6 **A. Defendant Has Procedurally Defaulted His Claims By Failing**  
 7 **To Raise Them Before The District Court or The Court of**  
 8 **Appeals on Direct Review**

9 Defendant has never raised any of his claims before this Court  
 10 or the Court of Appeals on direct review. It is well settled, as a  
 11 matter of Supreme Court and Ninth Circuit law, that a defendant's  
 12 failure to raise an issue before the district court and the court of  
 13 appeals on direct review amounts to a procedural default of that  
 14 claim. See, e.g., United States v. Frady, 456 U.S. 154, 162, 164,  
 15 102 S. Ct. 1584, 71 L.Ed.2d 816 (1982); United States v. Johnson, 988  
 16 F.2d 941 (9th Cir. 1993).

17 Once a claim has been procedurally defaulted, a court may a  
 18 court may entertain that claim in a § 2255 proceeding only if  
 19 defendant establishes both cause for failing to raise the issue and  
 20 resulting prejudice.<sup>3</sup> Frady, 456 U.S. at 162, 164; Benboe, 157 F.3d  
 21 at 1183; United States v. Ratigan, 351 F.3d 957, 964 (9th Cir. 2003).  
 22 Defendant has not, and cannot, meet any grounds for excusing his  
 23 procedural default.  
 24  
 25

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26 <sup>3</sup> A district court may also excuse a procedural default where  
 27 the defendant makes a colorable showing of actual, factual innocence.  
 28 See United States v. Benboe, 157 F.3d 1181, 1183 (9th Cir. 1998);  
Schlup v. Delo, 513 U.S. 298, 327-28 (1995). Defendant makes no such  
 claim in this case, so this exception is accordingly not applicable.



1           1.     Defendant Established No Cause For Failing To Raise  
 2                 His Claims Before The District Court Or On Appeal

3           The elements constituting "cause" have been narrowly construed  
 4 by the Supreme Court. First, a defendant may demonstrate that the  
 5 legal or factual argument was "so novel" that it was utterly  
 6 unavailable previously. See Reed v. Ross, 468 U.S. 1, 16, 104 S. Ct.  
 7 2901, 82 L.Ed.2d 1 (1984). Defendant makes no such claims in his  
 8 § 2255 motion.

9           Second, a defendant may attempt to demonstrate that his counsel  
 10 was constitutionally ineffective within the meaning of Strickland v.  
 11 Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L.Ed.2d 674 (1984).<sup>4</sup>  
 12 "Attorney error short of ineffective assistance of counsel does not  
 13 constitute cause for a procedural default." See Murray v. Carrier,  
 14 477 U.S. 478, 492, 106 S. Ct. 2639, 91 L.Ed.2d 397 (1986). Thus, to  
 15 prevail in this type of showing of "cause," defendant must prove that  
 16 (1) his counsel's performance was constitutionally deficient; and (2)  
 17 he was prejudiced by that deficient performance. Strickland, 466  
 18 U.S. at 684-87; Ratigan, 351 F.3d at 965. In evaluating an  
 19 ineffective assistance of counsel claim, the Court may consider the  
 20 performance and prejudice components of the Strickland test in either  
 21 order. Strickland, 466 U.S. at 697. Furthermore, the Court need not  
 22 consider one component if there is an insufficient showing of the  
 23 other. Id.

24           As to counsel's performance, "counsel is strongly presumed to  
 25 have rendered adequate assistance and made all significant decisions  
 26 in the exercise of reasonable professional judgment." Id. at 690.

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27           <sup>4</sup> In addition to these two grounds, a defendant may also contend  
 28 that government actors actually prevented his from raising the claim  
 on direct review. Such a contention has not been made in this case.

1 Moreover, "the mere fact that counsel failed to recognize the factual  
2 or legal basis for the claim, or failed to raise the claim despite  
3 recognizing it, does not constitute cause for a procedural default."  
4 Cockett v. Ray, 333 F.3d 938, 943 (9th Cir. 2003) (citation and  
5 internal quotation omitted).

6 Even if a defendant overcomes this presumption of reasonable  
7 performance by his counsel and demonstrates that his counsel's  
8 performance was deficient, a defendant must still show that such  
9 deficiency resulted in prejudice to him. Strickland, 466 U.S. at  
10 687. To establish prejudice, a defendant "must show that there is a  
11 reasonable probability that, but for counsel's unprofessional errors,  
12 the result of the proceeding would have been different. A reasonable  
13 probability is a probability sufficient to undermine confidence in  
14 the outcome." Id. at 694.

15 For the reasons discussed herein, defendant can neither  
16 establish that defense counsel's performance was constitutionally  
17 defective, nor that he suffered any prejudice from it. Accordingly,  
18 the defendant's two claims related to ineffective assistance of  
19 counsel should be denied.<sup>5</sup>

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21 <sup>5</sup> Defendant's ineffective assistance of counsel claims result in  
22 a waiver of the attorney-client privilege as to communications with  
23 his former counsel relevant to the ineffective assistance claim. In  
24 light of Bittaker v. Woodford, 331 F.3d 715 (9<sup>th</sup> Cir. 2003), however,  
25 the procedures required to define the contours of the appropriate  
26 waiver and implement it with the required limitations could  
27 significantly delay proceedings in this case. For the reasons set  
28 forth in this opposition, the government believes that defendant's  
ineffective assistance of counsel claims can be resolved against  
defendant without disclosure of communications between defendant and  
his former counsel, and so without the need for the parties and the  
Court to engage in the time-consuming procedures required to disclose  
those communications. If the Court disagrees, and believes that  
examination of the communications between defendant and his former  
counsel are necessary to resolution of defendant's ineffective

(footnote cont'd on next page)

a. *Defense Counsel Did Not Fail To Present  
Defendant's Mental Health History At Sentencing  
And Defendant Suffered No Prejudice*

Defendant complains that his lawyer failed to present defendant's mental history report and defendant was sentenced without it. CR 467, Defendant's 2255 Motion p. 6. Contrary to defendant's argument, the record establishes that defendant's counsel was not only effective, but extremely proactive in bringing to the Court's attention mitigating evidence related to defendant's mental history. In defendant's Sentencing Position, defense counsel, citing the PSR where appropriate, set forth in detail defendant's mental history beginning with the death of defendant's baby cousin when defendant was only six years old and the toll such a traumatic event had on defendant. CR 396, Defendant's Sentencing Position p. 4-5. Defense counsel proceeded to describe G. Rogers' plight as a youth dealing with the prevalence of violence, narcotics, crime, and utter lack of positive role models. Id., p. 5. Defense counsel explained that as a young adult, defendant's loss of custody of his daughter had a negative effect on defendant's mental health, causing depression, as well as diagnoses of bipolar disorder and schizophrenia. Id. Defense counsel also described how defendant's mental condition had a profound effect on his behavior in the instant offense. Id., p. 5-6. Therefore, defense counsel's performance was not deficient, and in no circumstance, constitutionally deficient as defense counsel

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assistance of counsel claims, the government requests that the Court find a limited waiver of the attorney-client privilege and permit the government to submit a filing setting forth procedures for implementing the waiver and requesting a briefing schedule for further addressing defendant's ineffective assistance claims.

1 affirmatively raised defendant's mental history for purposes of  
2 sentencing.

3 Furthermore, assuming defense counsel's performance were  
4 considered constitutionally deficient, defendant fails to offer any  
5 explanation of how such a failure prejudiced defendant.

6 *b. Defendant Was Appropriately Advised As To His*  
7 *Plea Agreement, Entered His Plea Voluntarily, and*  
*Suffered No Prejudice.*

8 Defendant contends that he signed his plea agreement because his  
9 attorney told him that he would not be accountable for the conduct of  
10 his co-defendants and that he would not get 204 months for his  
11 crimes. CR 467, Defendant's 2255 Motion p. 13. Contrary to  
12 defendant's assertions, based on the signed plea agreement, and the  
13 Court's change of plea hearing, defense counsel reviewed the plea  
14 agreement with his client, defendant signed the plea agreement having  
15 thoroughly reviewed it, and defendant's plea of guilty was determined  
16 by the Court to be made knowingly and voluntarily. CR 248, Plea  
17 Agreement; CR 339, Change of Plea.

18 With respect to defendant's argument that defense counsel told  
19 defendant he would not be held accountable for the conduct of his co-  
20 defendants - defense counsel raised this argument in his sentencing  
21 brief. Specifically, defense counsel argued that information  
22 regarding the other co-defendants was irrelevant to the PSR as  
23 defendant was only involved in a conspiracy with Harrell. CR 396,  
24 Defendant's Sentencing Position p. 2. The government, in its  
25 Sentencing Reply, argued that defendant was involved in a sex  
26 trafficking conspiracy, not only with Harrell, but also with Bell and  
27 S. Rogers. CR 412, Government's Sentencing Reply p. 2-5. The  
28 government also provided jail call transcripts and other evidence to

1 support its contention. Id. Therefore, while defense counsel argued  
2 to exclude defendant's involvement with his pimp co-defendants, the  
3 Court's decision to deny such an objection does not constitute a  
4 failure or deficiency as to the defense counsel's performance.

5 With respect to defendant's argument that defense counsel told  
6 him he would not get 204 months' imprisonment, such an argument is  
7 incredulous. As an initial matter, in Defendant's 2255 Motion, he  
8 quotes his attorney as telling him "you won't get 204 months for  
9 this." CR 467, Defendant's 2255 Motion p. 13. While the Court did  
10 sentence defendant to 204 months, prior to sentencing, there was no  
11 significance to that exact length of a prison term anywhere in the  
12 record. Rather, prior to sentencing, the relevant terms as to  
13 sentencing included 210 months (the government's recommendation, 219  
14 months (the USPO's recommendation) and 120 months (defense counsel's  
15 recommendation). Therefore, it is unlikely that defense counsel  
16 specifically stated that defendant would not get 204 months'  
17 imprisonment prior to sentencing.

18 Furthermore, even if defense counsel intimated that defendant  
19 would not get a sentence as high as 204 months, the record indicates  
20 that defendant pled guilty knowing the maximum possible sentence of  
21 life, the fact that the judge had the discretion to sentence  
22 defendant to anything up to life, and the fact that defendant's plea  
23 waiver barred him from appealing his sentence so long as it was at or  
24 below 240 months' imprisonment. Defendant indicated on his plea  
25 agreement that he was voluntarily pleading guilty, knowing the  
26 possible consequences described therein. CR 248, Plea Agreement. In  
27 fact, defendant even acknowledged that in the plea agreement that  
28 "[n]o promises, inducements, or representations of any kind have been

1 made to me other than those contained in this agreement." Id., p.  
2 20. At the change of plea, the Court only accepted the guilty plea  
3 after being satisfied by defendant's responses and the Court's own  
4 observation, that defendant was voluntarily pleading guilty. Thus  
5 there is no evidence -- either offered by defendant or within the  
6 record -- that defendant was pleading guilty without knowing the  
7 possible consequences.

8 Furthermore, defendant has failed to demonstrate how defense  
9 counsel's alleged deficient performance prejudiced defendant.

10 Because defendant has not and cannot establish that his counsel  
11 was ineffective, he cannot show cause for failing to raise the issues  
12 in his 2255 motion before this Court or the Court of Appeals.

13 2. Defendant Demonstrated No Prejudice As To His 2255  
14 Claims To Overcome Procedural Default

15 Even if defendant had shown cause, excusing his failure to  
16 previously raise his claims (which he did not), defendant has made no  
17 effort to demonstrate prejudice. Indeed, he cannot do so, as his  
18 claims, discussed in detail herein, are without merit.

19 **B. Defendant's Claims Fail On The Merits**

20 Under 28 U.S.C. § 2255, the court is authorized to grant relief  
21 if it concludes that "the sentence was imposed in violation of the  
22 Constitution or laws of the United States, or that the court was  
23 without jurisdiction to impose such sentence, or that the sentence  
24 was in excess of the maximum authorized by law, or is otherwise  
25 subject to collateral attack." Tripati v. Henman, 843 F.2d 1160,  
26 1162 (9th Cir.1988). If the court finds that relief is warranted  
27 under Section 2255, it must "vacate and set the judgment aside" and  
28 do one of four things: "discharge the prisoner or resentence him or

1 grant a new trial or correct the sentence as may appear appropriate."  
2 28 U.S.C. § 2255(b); see also United States v. Barron, 172 F.3d 1153,  
3 1157 (9th Cir.1999).

4 In this case, even if defendant's claims were not procedurally  
5 defaulted, the claims do not present valid bases for relief under  
6 § 2255. As to defendant's claims related to ineffective assistance  
7 of counsel, the same analysis as presented above applies.

8 Defendant's only remaining claim is that he lacked access to a law  
9 library until after he signed a plea agreement. CR 467, Defendant's  
10 2255 Motion p. 9. While prisoners have a right to reasonable access  
11 to the courts, prisoners have no "abstract, freestanding right to a  
12 law library or legal assistance . . ." Lewis v. Casey, 518 U.S. 343,  
13 351 (1996). In order to be deemed a constitutional violation, a  
14 prisoner must demonstrate that "alleged shortcomings to a prison law  
15 library or legal assistance program hindered his efforts to pursue a  
16 legal claim." Id.

17 In this case, defendant has made no showing of how his lack of  
18 access to a library hampered his ability to raise any specific claim.  
19 Furthermore, during the relevant period of time, defendant was  
20 represented by counsel and therefore did have access to legal  
21 assistance. Notably, from December 31, 2013, through June 3, 2014,  
22 defendant was housed MDC-LA, where he did have access to a law  
23 library. While defendant had already signed a plea agreement at that  
24 stage of the proceeding, defendant was not prevented from raising an  
25 appeal as to any alleged claims.

26 This Court should deny defendant's request for relief under  
27 § 2255, as each of defendant's claims have been procedurally  
28 defaulted and also fail on the merits.

1           **C.     This Court Should Deny Any Request for a Certificate of**  
2           **Appealability**

3           As discussed above, none of defendant's claims has merit. Nor  
4 has defendant "made a substantial showing of the denied of a  
5 constitutional right" as to any of these issues, which is requirement  
6 if defendant is to obtain a certificate of appealability ("COA") in  
7 order to appeal this Court's ruling. See 28 U.S.C. §§ 2253(c)(2),  
8 (c)(3). The government therefore requests that this Court deny any  
9 request for a COA.

10          **IV.   CONCLUSION**

11          For the foregoing reasons, the government respectfully requests  
12 that this Court or deny defendant's § 2255 motion.  
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